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May 15, 2008

VIA EMAIL

Ms. Suzanne M. Tetreault
Special Counsel, Market Disputes Resolution Division
Enforcement Bureau
Federal Communications Commission
445 Twelfth Street S.W.
Washington, D.C. 20554

Re: Beehive Telephone Companies v. Sprint Nextel Corporation
File No. EB-08-MDIC-0029

Dear Ms. Tetreault:

In its letter of April 30, 2008 ("Response"), Sprint Nextel Corporation ("Sprint Nextel") argued at length that the Commission lacked the subject matter jurisdiction to entertain the above-referenced informal complaint filed by my clients, Beehive Telephone Company, Inc. and Beehive Telephone Co., Inc. Nevada (collectively "Beehive").

Sprint Nextel contends that the Commission is without authority to determine whether an IXC engages in an unjust and unreasonable practice within the meaning of § 201(b) of the Communications Act of 1934, as amended ("Act"), when it refuses to pay Beehive's tariffed access charges until the issue of access stimulation is — in Sprint Nextel's words — "firmly understood" and finally resolved by some federal courts. It professes to see no nexus between that conduct and § 201(b), which prohibits carriers from engaging in unjust and unreasonable practices "in connection with" its interstate communication service. 47 U.S.C. § 201(b). We submit that the nexus is clear.

JURISDICTION

With respect to jurisdiction, the Commission has held that it has jurisdiction to implement the requirement of § 201(b) that all practices "in connection with" a carrier's communications service be just and reasonable. *See, e.g., Federal-State Joint Board on Universal Service,* 17

FCC Rcd 24952, 24958 (2002). The Commission also takes an expansive view of its jurisdiction under § 201(b) to prevent unjust and unreasonable practices by carriers in connection with their communication services. *See Business Discount Plan, Inc.*, 15 FCC Rcd 24396, 24398 ((2000) (Commission does not have to have a "uniquely federal interest" to invoke its § 201(b) jurisdiction over deceptive marketing practices by carriers in connection with communications service). The breadth of the Commission's § 201(b) jurisdiction clearly reaches a carrier's practices as an interstate access service customer.

As Beehive argued in its informal complaint, the Commission's authority to issue the requested declaratory ruling stems from its primary jurisdiction over tariff/rulemaking matters than are subject to its particular expertise and beyond those of a federal district court. Beehive simply wanted the Commission to mediate the dispute and, if mediation proved unsuccessful, to issue a declaratory ruling that would obviate the need for a judicial referral under the primary jurisdiction doctrine. We will show that Beehive's goals were entirely in line with Commission's policies in cases of improper carrier "self-help" practices. *See infra* p. 5.

Beehive has now filed suit against Sprint Nextel to collect its properly-billed access charges. The suit is pending in the U.S. District Court for the District of Utah in Docket No. 2:08-cv-00380-DB. If the Commission is disinclined either to mediate the dispute or to issue a declaratory ruling in aid of the District Court, Beehive respectfully requests that its informal complaint be dismissed without prejudice so that § 207 of the Act will pose no bar to Beehive proceeding in the Court. *See U.S. TelePacific Corp. v. Tel-America of salt Lake City, Inc.*, 19 FCC Rcd 24552, 24556-57 (2004).

Although it strenuously denied that the Commission has jurisdiction, and belittled Beehive's interest in obviating the need for a primary jurisdiction referral as "ironic if not complete nonsense," Response, at 7 n.11, Sprint Nextel proceeded to telegraph its intent to raise issues before the District Court that could require a referral. Sprint Nextel concluded its Response with the following:

> [I]f Beehive were to pursue its claims against Sprint Nextel by filing suit in federal district court, Sprint Nextel would be able to seek documents that would help inform the court's determination as to whether Beehive was actually providing access service as defined in the NECA tariffs. For example, most, if not all of, the calls in question apparently were sent to All American Telephone Company, a competitive LEC authorized to provide service in various parts of Utah for termination. If that is the case, then Beehive may not be providing an access service to Sprint Nextel since as defined in NECA's access tariffs (Tariff FCC No. 5, §2.6) access is provided to enable calls to be terminated at an end user. A carrier is not an end user except in limited circumstances not relevant here.

This is exactly the type of issue that could have been addressed and easily resolved in mediation by referring Sprint Nextel to § 2.4.7 of NECA Tariff F.C.C. No. 5, which shows that the tariff permits access service to be provided by more than one carrier. In any event, if it succeeds in dissuading the Commission from providing declaratory relief, Sprint Nextel should be precluded from asking the District Court to refer this case back to the Commission.

The bottom line is that the Commission unquestionably has jurisdiction to interpret the provisions of the NECA tariff and determine whether Sprint Nextel has acted lawfully. It is settled law that the terms of a tariff on file with the Commission "are considered to be the law and conclusively and exclusively enumerate the rights and liabilities as between the carrier and the customer." *NOS Communications, MDL No. 1657,* 459 F.3d 1052, 1056 (9th Cir. 2007). Because tariffs filed pursuant to § 203 of the Act constitute the law between the parties, the Commission has long held that it is contrary to § 203 for a carrier to employ "self-help remedies" that involve the non-payment of charges properly billed under a tariff on file with the Commission. *Bell Telephone Co. of Pennsylvania*, 66 FCC 2d 227, 229 (1977). Beehive submits that a carrier's practice that violates the law established by tariff, and is contrary to § 203 and Commission case law, is also an unjust and unreasonable practice under § 201(b). The Commission has the authority to issue a declaratory ruling to that effect, and can do so without acting as a collection agent for Beehive.

THE VIOLATION

The Commission's rule against carrier "self-help" practices was announced in *MCI Telecommunications Corp.*, 62 FCC 2d 703 (1976). After finding that MCI was legally obligated to pay all charges properly billed it pursuant to tariff, the Commission noted that MCI's "self-help approach" is contrary to § 203 of the Act and "existing case law." *MCI,* 62 FCC 2d at 705-6. The Commission explained:

> Section 203(c) of the Act specifically forbids carriers from charging or collecting different compensation than specified in an effective tariff. Tariffs which are administratively valid operate to control the rights and liabilities between the parties. Rates published in such tariffs are rates imposed by law. Withdrawal from this position would invite unlawful discrimination. **** We cannot condone MCI's refusal to pay the tariffed rate for voluntarily ordered service.

Id. at 706. The Commission noted that its "finding that self-help is not an acceptable remedy does not leave MCI without recourse." *Id.* The Commission directed MCI to §§ 206 — 209 of the Act "which set forth a complaint procedure to be used by persons who believe that a carrier is violating the Act." *Id.*

Sprint Nextel's conduct in this case clearly represents prototypical self-help despite its attempt to narrow the definition of the term. As the *MCI* case demonstrates, prohibited self-help

can involve a "case where a customer that has not paid its bills for the telecommunications services allegedly provided by a common carrier asks that the Commission enjoin the carrier from terminating service." Response, at 2-3. But the carrier need not ask the Commission for relief to be guilty of unlawful self-help. What is unlawful is the carrier's resort to refusing to pay charges properly billed pursuant to tariff, rather than paying the charges and then challenging their lawfulness via a § 208 complaint. *See, e.g., Bell Atlantic-Delaware v. Frontier Communications Services, Inc.*, 15 FCC Rcd 7475, 7479-80 (2000). In other words, the gravamen of prohibited self-help is the carrier's "unilateral determination" that rates are unreasonable and need not be paid. *See AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues,* 16 FCC Rcd 19158, 19164 (2001), *petition for review granted on other grounds, AT&T Corp. v. FCC,* 317 F.3d 227 (D.C. Cir. 2003).

Research has not shown that the Commission has overruled or disavowed its rule against carrier use of self-help remedies. The rule was reaffirmed last year, when the Wireline Competition Bureau issued a declaratory ruling that IXCs should employ the Commission's formal and informal complaint processes to seek relief from alleged access stimulation, and "may not engage in self help actions such as call blocking." *See Establishing Just and Reasonable Rates for LECs*, 22 FCC Rcd 11629, 11629 (WCB 2007) ("*Self Help Ruling*"). The Bureau held that "carriers may not engage in self help by blocking traffic to LECs allegedly engaged in [access stimulation]." *Id.* at 11631. Noting that the Commission had found that call blocking generally was an unjust and unreasonable practice under § 201(b), the Bureau found that allegations of access stimulation by LECs do not warrant call blocking or serve as a "basis for questioning the legitimacy of calls to the customers of the LECs." *Id.* at 116331a.

The teaching of the *Self Help Ruling* is that allegations of access stimulation do not provide cause for IXCs to take unilateral action that may ultimately degrade the reliability of the nation's telecommunications network. *See id.* at 11631 n.15 and accompanying text. In this case, Sprint Nextel wants to continue to use Beehive's access services — as well as the services of many other LECs and CLECs around the country — to complete its customers' calls, but not pay for the service based on its unilateral finding that Beehive must be stimulating access traffic since Sprint Nextel's customers are making too many calls to chat lines. The ultimate consequence of Sprint Nextel's self-help practice will be that Beehive and other carriers will be forced to discontinue service to Sprint, thereby compromising the ubiquity of the nation's telecommunications network.

If IXCs "may not engage in self help actions such as call blocking" in cases of suspected access stimulation, *id.* at 11629, Sprint Nextel also may not engage in the self-help action of refusing to pay NECA rates in cases of suspected access stimulation. Beehive sees no reasoned distinction between the two forms of self-help that would justify prohibiting call blocking but permitting the non-payment of tariffed rates. If the rule is that an IXC that contends that access charges have been stimulated must resort to filing informal and formal complaints and may not engage in self-help actions such as call blocking, then Sprint has violated the rule. The issuance

of a declaratory ruling that Sprint Nextel acted unlawfully by engaging in the self-help practice of not paying NECA rates would no more exceed the Commission's jurisdiction than the issuance of the *Self Help Ruling* that Sprint Nextel would act unlawfully by engaging in the self-help practice of blocking calls.

Sprint Nextel contends that a declaratory ruling that its self-help actions violated § 201(b) would permit carries to file § 208 complaints against access service customers seeking damages equal to their unpaid charges and late-payment penalties. *See* Response, at 7. That contention is unfounded. The Commission can declare that: (1) by refusing to pay access service charges solely because of alleged access stimulation, Sprint Nextel engaged in prohibited self-help practices in violation of its payment obligations under the NECA tariff and § 201(b) of the Act; and (2) by failing to pursue its access stimulation claims as required by the *Self Help Ruling,* Sprint Nextel is barred by the filed-rate doctrine from asserting those claims to challenge the lawfulness of Beehive's charges in any judicial forum. *See NOS Communications,* 495 F.3d at 1056-57.

Sprint Nextel should not be heard to complaint if the Commission issues an unfavorable ruling. "Any carrier that engages in self-help ... runs the risk that the Commission will find against it." *AT&T,* 317 F.3d at 234.

MEDIATION

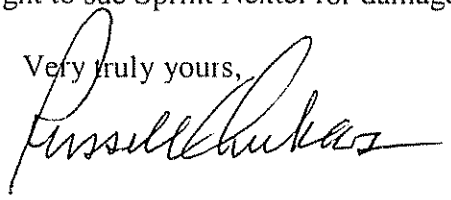
Sprint declined to cooperate in any Commission attempt to mediate its dispute with Beehive charging that it would amount to a "sham mediation." Response, at 7. To the contrary, mediation by the Commission would be a reasonable approach that is consistent with precedent. Indeed, after concluding that MCI had engaged in unlawful self-help, the Commission approved a proposal under which the parties would meet under the aegis of the Common Carrier Bureau to discuss a reasonable payment plan. *See MCI,* 62 FCC 2d at 706. There is no reason that a similar meeting would be a "sham" in this case. Sprint Nextel's unwillingness to participate in such a meeting exemplifies the unreasonable practices it has employed throughout this dispute.

Beehive's request for mediation in no way belies the fact that its informal complaint is not one for the recovery of damages. As Beehive reads them, the Commission's informal complaint rules establish a process in which the carrier is given an opportunity either to satisfy the complaint or respond to it. *See* 47 C.F.R. § 1.717. If the informal complaint is not satisfied, and if it is not satisfied with either the response of the carrier or the Commission, the complainant may file a formal § 208 complaint. *See id.* Beehive expressed its willingness to submit to mediation in the hope that Sprint Nextel would agree to terminate its self-help efforts and to enter into a reasonable payment plan. Beehive's request for mediation did not transform its informal complaint into one for an award of damages. The Commission's informal complaint process does not envision the adjudication of a claim for damages and Beehive has made no such claim.

Finally, Beehive has limited its discussion to responding Sprint's contentions. Beehive has not addressed Sprint's original, unsupported allegation that Beehive is engaged in access stimulation. Beehive's silence on the subject should not be construed as an admission that it is engaged in that practice or as a concession that the practice is impermissible. Sprint Nextel's response simply did not call for Beehive to delve into such matters.

In view of the foregoing, Beehive respectfully requests that the Commission: (1) agree to mediate the dispute and to invite Sprint Nextel to participate; (2) in the event Sprint Nextel declines the invitation, consider whether the requested declaratory relief should be provided; and (3) if it decides that such relief would be improvidently granted, dismiss Beehive's informal complaint without prejudice to its right to sue Sprint Nextel for damages in District Court.

Very truly yours,



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